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IN THE
COURT OF APPEALS OF INDIANA

IRA C. WHITE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A03-0608-CR-369
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable William H. Albright, Judge
Cause No. 71D01-0210-PC-37

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Ira White ("White") appeals the trial court's denial of his petition for post-conviction relief.

We affirm.

ISSUE

Whether the trial court erred when it denied White's petition wherein he challenged the waiver of his right to trial by jury.

FACTS

On White's direct appeal, our Supreme Court set out the facts as follows:

> On October 19, 1992, Valerie Diggins and her two sons, Columbus and Cortez Coleman, were visiting Ms. Diggins' mother at 201 East Pennsylvania Avenue in South Bend. The boys were playing in the front yard at their grandmother's home and their mother was in the yard talking to Olivia Harris.
>
> A car drove up and stopped nearby and Steve Gavin and [White] got out. [White]'s brother, Chris White, was standing nearby and informed [White] that Marty Henderson and Willie Jones had tried to 'jump him.' [White] started walking toward the residence at 201 East Pennsylvania. As he approached, he drew a handgun and began to shoot in the direction of Henderson and Jones. Ms. Diggins and her boys were in the line of fire. Ms. Diggins hurriedly got the boys inside the house. Then she discovered that Columbus was hit in the back. An ambulance arrived but Columbus died later in the hospital.
>
> During the shooting, [White] shouted that he would kill both men, referring to Henderson and Jones. Then he shouted that he would kill everybody in the house. [White] emptied his gun, ran back to the car, reloaded the gun, and continued to shoot toward the house. The police apprehended [White] and obtained a handgun that had been used in the shooting.

White v. State, 638 N.E.2d 785, 785 (Ind. 1994).

On October 20, 1992, the State charged White with murder. The State amended its charging information on March 1, 1993 and further charged White with attempted murder, and four counts of class D felony criminal recklessness. On March 30, 1993, the trial court scheduled White's jury trial to commence on August 2, 1993. However, on July 16, 1993, the trial court noted in its chronological case summary that "[p]ursuant to I.C. 35-34-1-2 [White] knowily [sic] waives jury trial." (White's App. 106). The trial court also issued an order stating that White had "knowingly waive[d] jury trial." (White's App. 97).

On August 3, 1993, White's bench trial commenced and ended the following morning. Thereafter, the trial court found White guilty of murder and three counts of criminal recklessness. On November 5, 1993, the trial court imposed a 60-year sentence for the murder offense, and three three-year sentences on the criminal recklessness offenses to be served concurrently with the murder sentence, for an aggregate sentence of sixty years.

White appealed to our Supreme Court, which affirmed the trial court's judgment. *See White*, 638 N.E.2d at 785. On October 11, 2002, White filed a *pro-se* petition for post-conviction relief, wherein he challenged the waiver of his right to trial by jury as fundamental error and asserted the ineffectiveness of his trial and appellate counsel.[1]

The post-conviction court held an evidentiary hearing on June 23, 2006. At the hearing, White's counsel for both his trial and his direct appeal, Brian May, testified that

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[1] White asserts no claims of ineffectiveness of trial and appellate counsel in this appeal.

he explained his trial strategy to White for waiving trial by jury because, in his opinion, "the evidence created issues of intent or diminished responsibility." Ruling 1. May believed that "the issues of criminal responsibility were better tried to a court than to a jury," and advised White as such. Ruling 1. May testified further that White "understood this advice" and "that the final decision was made by Ira White." Ruling 1. May testified that "Mr. White knowingly and voluntarily waived a jury trial." Ruling 1-2.

White did not testify or assert that he did not knowingly or intelligently waive his right to trial by jury. However, in support of his argument, he did submit into evidence the following: (1) the direct appeal record; (2) his motion to supplement the record; (3) the direct appeal decision; and (4) the court reporter's affidavit stating that the court reporter's notes and the transcript showing a jury trial waiver were unavailable.

On June 28, 2006, the trial court issued its ruling, wherein it denied White's petition for post-conviction relief. Citing *Hall v. State*, 849 N.E.2d 466, 473 (Ind. 2006), the post-conviction court ruled as follows:

> [L]ack of a lost record is not fatal to the State. The Supreme Court notes the passage of time as a problem. I[t] further notes no fault by the State in causing an unavailable record.
>
> In the present case steno notes and the recording from 1993 by a former court reporter could not be found. There is not fault in this respect by the State.
>
> Ira White did not testify or state that he did not waive jury trial. He did not subject himself to cross-examination. He has not carried his burden of proof.

Ruling 2. White now appeals.

DECISION

Post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal. *Allen v. State*, 791 N.E.2d 748, 752 (Ind. Ct. App. 2003). Post-conviction proceedings are civil in nature, and petitioners must establish their grounds for post-conviction relief by a preponderance of the evidence. *Smith v. State*, 822 N.E.2d 193, 198 (Ind. Ct. App. 2005).

When a petitioner appeals the denial of post-conviction relief, he appeals from a negative judgment. *Allen*, 791 N.E.2d at 752. "[T]o the extent his appeal turns on factual issues, the petitioner must convince this court that the evidence 'as a whole leads unerringly and unmistakably to a decision opposite that reached by the post-conviction relief court.'" *Smith*, 822 N.E.2d at 198. "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004). We accept the post-conviction court's findings of fact unless they are clearly erroneous, but we do not give deference to the court's conclusions of law. *Allen*, 791 N.E.2d at 752.

White argues that the post-conviction court erred in denying his petition for post-conviction relief because there is no record that shows that he knowingly waived his right to a trial by jury. Accordingly, he asserts that the State violated his constitutional right to a trial by jury. We disagree.

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues that they failed to raise at trial or on direct appeal. *Id.* Rather,

the remedy is limited in its application to issues which were either not known at the time of the original trial or those that were unavailable on direct appeal. *Bahm v. State*, 789 N.E.2d 50, 57 (Ind. Ct. App. 2003). "Issues that were known and available but not raised on direct appeal are waived, and thus, are unavailable to post-conviction review." *Hooker v. State*, 799 N.E.2d 561, 569 (Ind. Ct. App. 2003).

Here, White's claim that he did not knowingly waive his right to trial by jury was available and appropriate for direct appeal; however, he failed to assert it. Accordingly, we deem this claim waived and unavailable for post-conviction review. Waiver notwithstanding, however, White's arguments are unavailing. He contends that he is entitled to post-conviction relief merely because the court reporter's notes and the recording from 1993 are lost or have been inadvertently destroyed. Our Supreme Court has recently opined,

> The circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old. * * * On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights.

Hall v. State, 849 N.E.2d 466, 472 (Ind. 2006).

A trial court speaks through its records. *Woolley v. Washington Twp. of Marion County Small Claims Court*, 804 N.E.2d 761, 766 (Ind. Ct. App. 2004). Here, the record is not completely silent, but rather, part of it is missing. Both the trial court's order and its chronological case summary of filings and proceedings indicate that White knowingly waived his right to trial by jury. (White's App. 97, 106). At the evidentiary hearing on

his petition for post-conviction relief, White did not testify or assert that he did not knowingly waive his right to trial by jury. Nor did he subject himself to cross-examination. Rather, his entire argument hinges upon the fact that "there is no direct record" of his decision to relinquish his right to trial by jury. White's Br. 3. "[A]s with any claim, the petitioner has the burden of demonstrating by a preponderance of the evidence that he is entitled to post-conviction relief." *Hall*, 849 N.E.2d at 473. Because White has failed to carry his burden, we must affirm the judgment of the post-conviction court.

Affirmed.

KIRSCH, J., and MATHIAS, J., concur.